Wee Choo Keong v Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM/MCMC)

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO WA-25–225–08 OF 2023
AMARJEET SINGH J
2 MAY 2024

Civil Procedure — Discovery of documents — Application for discovery in judicial review proceedings — Access to applicant's blog restricted by hosting company on instruction by Malaysian Communications and Multimedia Commission ('MCMC') — MCMC acted on instruction by Royal Malaysian Police — Applicant applied for discovery of documents pursuant to O 53 r 6 of Rules of Court 2012 — Whether documents existed — Whether documents in MCMC's possession — Whether documents sought were relevant and necessary — Whether documents were necessary for disposing fairly of the matter — Whether disclosure of documents would be injurious to public interest and hence documents were privileged — Communications and Multimedia Act 1998 ss 3(3) & 233 — Penal Code s 500 — Rules of Court 2012 O 24 & O 53 r 6

The applicant was the owner of a blog website known as weechookeong.com ('the blog'). The access to the blog was restricted by the company hosting the blog on the instruction of the Malaysian Communications and Multimedia Commission ('MCMC') and when confronted by the applicant, MCMC stated that it acted on the request/instructions of the Royal Malaysian Police ('RMP') to provide technical assistance against the applicant in an investigation under s 500 of the Penal Code ('the PC') and s 233 of the Communications and Multimedia Act 1998 ('the CMA'). Disgruntled with the decision and/or act of the MCMC, the applicant filed an application for leave to commence judicial review proceedings and such application was granted by the court. The applicant then requested certain documents from the MCMC, but the latter refused to fulfill such a request on the grounds that the said documents were part of RMP's ongoing investigation and the MCMC was not at liberty to disclose the documents. The applicant then filed the present application for discovery pursuant to O 53 r 6 of the Rules of Court 2012. The documents sought to be discovered by the applicant were: (a) letters and/or emails from RMP to the MCMC requesting the MCMC to block and/or restrict access to the blog; and (b) letters and/or emails from the MCMC instructing the telecommunication companies to block and/or restrict access to the blog ('the documents'). The issues arose were in relation to: (i) the existence and possession of the documents sought; (ii) whether the documents sought were relevant and necessary; (iii) whether the documents were necessary for

A disposing fairly of the matter; and (iv) whether the documents sought were privileged.

Held, allowing the application for discovery:

B (1) The MCMC had admitted in its affidavit in reply to discovery (encl 26) the existence of the documents sought. Therefore, the elements of existence and possession of the documents by the MCMC were satisfied. The applicant was not on a fishing expedition, and neither would the discovery be unduly oppressive on the MCMC (see para 22).

C (2) It was very compelling from the affidavit evidence that the MCMC acted on the instructions of the RMP and not in the exercise of their discretion. In the circumstances, the contents of the said request/instructions of the RMP were relevant for the court to decide if the MCMC had acted in accordance with the requirements of the D CMA. Thus, the documents sought were relevant as they related directly to matters in question in the judicial review proceedings. The documents contained information which would enable the applicant to advance his own case or to damage the case of the MCMC (see E paras 24–25).

(3) While the crux of the applicant's application was that the MCMC had acted illegally and/or irrationally to block and/or restrict access to the applicant's blog merely because the RMP had requested/instructed the MCMC to do so. It appeared that the MCMC acted on the dictation of F the RMP without exercising its own discretion. Thus, there was prima facie evidence before the court that documents which ought to have been before the court were not produced to dispose of the matter fairly (see para 27).

G (4) The court was satisfied that the ultimate test to dispose of the matter fairly had been satisfied. Valid questions arose to ascertain: (a) whether the MCMC had acted in accordance with the law when giving instructions to block and/or restrict access to the applicant's blog; (b) the propriety and/or validity of the grounds by the RMP for so requesting H and/or instructing the MCMC; and (c) whether the MCMC had breached its statutory and public duty that there was no censorship as provided under s 3(3) of the CMA. The documents sought would enable the applicant to respond accordingly as to whether the request and/or instructions of the RMP were lawful and in accordance with the I law. In the upshot, the documents sought were relevant and necessary so that the justice of the case may be advanced and for disposing fairly of the substantive judicial review proceedings (see paras 28–30).

(5) The documents sought were not of a class that demanded protection. The principle was that public interest demanded that evidence being

withheld was to be weighed against the public interest in the administration of justice and that courts should have the fullest possible access to all relevant materials. The documents sought were not in relation to police investigations but blocking or restricting access to the blog where one of the objects of the CMA was not to permit censorship of the internet. The court opined that the documents were not envisaged by the principle stated in *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2018] 6 MLJ 670. The court, therefore, was satisfied that the discovery of the documents was permitted and not injurious to the public interest (see paras 38 & 41).

[Bahasa Malaysia summary

Pemohon adalah pemilik laman web blog yang dikenali sebagai weechookeong.com ('blog tersebut'). Capaian ke blog tersebut disekat oleh syarikat hos blog tersebut atas arahan Suruhanjaya Komunikasi dan Multimedia Malaysia ('SKMM') dan apabila dipersoalkan oleh pemohon, SKMM menyatakan bahawa ia bertindak atas permintaan/arahan Polis Diraja Malaysia ('PDRM') untuk memberikan bantuan teknikal terhadap pemohon dalam penyiasatan di bawah s 500 Kanun Keseksaan ('KK') dan s 233 Akta Komunikasi dan Multimedia 1998 ('AKM'). Tidak berpuas hati dengan keputusan dan/atau tindakan SKMM, pemohon memfailkan permohonan kebenaran untuk memulakan prosiding semakan kehakiman dan permohonan tersebut telah diluluskan oleh mahkamah. Pemohon kemudian meminta dokumen-dokumen tertentu daripada SKMM, tetapi SKMM enggan memenuhi permintaan tersebut atas alasan bahawa dokumen-dokumen tersebut adalah sebahagian daripada siasatan PDRM yang sedang dijalankan dan SKMM tidak mempunyai kebebasan untuk mendedahkan dokumen-dokumen tersebut. Pemohon kemudiannya memfailkan permohonan semasa untuk penzahiran menurut A 53 k 6 Kaedah-Kaedah Mahkamah 2012. Dokumen-dokumen yang diinginkan oleh pemohon untuk dizahirkan ialah: (a) surat dan/atau e-mel daripada PDRM kepada SKMM yang meminta SKMM untuk menghalang dan/atau menyekat akses kepada blog tersebut; dan (b) surat dan/atau emel daripada SKMM yang mengarahkan syarikat-syarikat telekomunikasi untuk menghalang dan/atau menyekat akses kepada blog tersebut ('dokumen-dokumen tersebut'). Isu-isu yang timbul adalah berhubung dengan: (i) kewujudan dan pemilikan dokumen-dokumen yang dipohon; (ii) sama ada dokumen-dokumen yang dipohon adalah relevan dan perlu; (iii) sama ada dokumen-dokumen tersebut perlu untuk menyelesaikan perkara tersebut secara adil; dan (iv) sama ada dokumen-dokumen yang dipohon adalah dokumen-dokumen terlindung.

Diputuskan, membenarkan permohonan untuk penzahiran:

(1) SKMM telah mengakui dalam afidavit jawapannya kepada penzahiran (lampiran 26) tentang kewujudan dokumen-dokumen yang dipohon.

Oleh itu, elemen kewujudan dan pemilikan dokumen-dokumen tersebut oleh SKMM telah dipenuhi. Pemohon bukanlah dalam ekspedisi memancing, dan penzahiran tersebut juga tidak akan menindas SKMM dengan berlebih-lebihan (lihat perenggan 22).

(2) Berdasarkan keterangan afidavit, adalah amat meyakinkan bahawa SKMM bertindak atas arahan PDRM dan bukan mengikut budi bicara mereka. Dalam keadaan tersebut, kandungan permintaan/arahan PDRM tersebut adalah relevan untuk mahkamah memutuskan sama ada SKMM telah bertindak mengikut kehendak AKM. Oleh itu, dokumen-dokumen yang dipohon adalah relevan kerana ia berkaitan secara langsung dengan perkara yang dipersoalkan dalam prosiding semakan kehakiman. Dokumen-dokumen tersebut mengandungi maklumat yang membolehkan pemohon memajukan kesnya sendiri atau memudaratkan kes SKMM (lihat perenggan 24–25).

(3) Inti pati permohonan pemohon ialah SKMM telah bertindak secara tidak sah dan/atau tidak rasional untuk menghalang dan/atau menyekat akses kepada blog pemohon semata-mata kerana PDRM telah meminta/mengarahkan SKMM berbuat demikian. Namun demikian, kelihatannya SKMM bertindak atas imlak PDRM tanpa menggunakan budi bicaranya sendiri. Oleh itu, terdapat keterangan prima facie di hadapan mahkamah bahawa dokumen-dokumen yang sepatutnya ada di hadapan mahkamah tidak dikemukakan bagi menyelesaikan perkara tersebut secara adil (lihat perenggan 27).

(4) Mahkamah berpuas hati bahawa ujian muktamad untuk menyelesaikan perkara tersebut secara adil telah dipenuhi. Persoalan-persoalan sah timbul bagi menentukan: (a) sama ada SKMM telah bertindak mengikut undang-undang semasa memberi arahan untuk menghalang dan/atau menyekat akses ke blog pemohon; (b) kewajaran dan/atau keabsahan alasan yang diberikan oleh PDRM untuk meminta dan/atau mengarahkan SKMM; dan (c) sama ada SKMM telah melanggar kewajipan berkanun dan awamnya bahawa tidak boleh ada penapisan seperti yang diperuntukkan di bawah s 3(3) AKM. Dokumen-dokumen yang dipohon akan membolehkan pemohon menjawab dengan sewajarnya sama ada permintaan dan/atau arahan PDRM tersebut adalah sah dan mengikut undang-undang. Kesimpulannya, dokumen-dokumen yang dipohon adalah relevan dan perlu supaya keadilan kes boleh dicapai dan untuk menyelesaikan prosiding semakan kehakiman yang substantif secara adil (lihat perenggan 28–30).

(5) Dokumen-dokumen yang dipohon bukanlah dari jenis yang memerlukan perlindungan. Prinsipnya ialah kepentingan awam menuntut keterangan yang disekat hendaklah ditimbang dengan kepentingan awam dalam pentadbiran keadilan dan mahkamah harus mempunyai akses sepenuhnya kepada semua keterangan yang

berkaitan. Dokumen-dokumen yang dipohon bukanlah berkaitan dengan penyiasatan polis tetapi berkaitan dengan penghalangan atau penyekatan akses kepada blog tersebut di mana salah satu objek AKM adalah tidak membenarkan penapisan internet. Mahkamah berpendapat bahawa dokumen-dokumen tersebut tidak termasuk dalam prinsip yang dinyatakan dalam *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2018] 6 MLJ 670. Oleh itu, mahkamah berpuas hati bahawa penzahiran dokumen-dokumen tersebut dibenarkan dan tidak memudaratkan kepentingan awam (lihat perenggan 38 & 41).]

Cases referred to

BA Rao & Ors v Sapuran Kaur & Anor [1978] 2 MLJ 14, FC (refd)
Carlow Kilkenny Radio Ltd, Kildare Radio Ltd and Carlow Kildare Radio Ltd v Broadcasting Commission of Ireland [2003] 3 IR 528, SC (refd)
Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya [2019] MLJU 282, FC (refd)
Husdi v PP [1979] 2 MLJ 304 (refd)
Martin Rhienus v Sher Singh [1949] 1 MLJ 201, CA (refd)
Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor [2018] 6 MLJ 670, CA (refd)
Rekapacific Bhd v Securities Commission & Anor and other appeals [2005] 2 MLJ 269, CA (refd)
State of Uttar Pradesh v Raj Narain AIR 1975 SC 865, SC (folld)
Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor and another appeal [2018] 2 MLJ 322; [2018] 1 CLJ 258, CA (refd)
Tan Sri Dato' Sri Khalid bin Abu Bakar (DIG) Pengerusi Lembaga Tatatertib Polis Diraja Malaysia & Ors v Muhammad Farid bin Muntalib [2015] 2 MLJ 783, CA (refd)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (refd)

Legislation referred to

Communications and Multimedia Act 1998 ss 3(3), 70, 233
Federal Constitution arts 8, 10(1)
Penal Code ss 499, 500
Rules of Court 2012 O 24, O 24 rr 3(4), 8, 15, O 53, O 53 r 6

Wee Choo Keong (with Yeo Wei Min) (Wee Choo Keong & Faaiz) for the applicant.
Sithambaran Vairavan (with Ruebankumar Asokan) (Sitham and Assoc) for the respondent.

Amarjeet Singh J:

INTRODUCTION

[1] This judgment concerns an application for discovery dated 25 September 2023 made in judicial review proceedings pursuant to O 53 r 6 of the Rules of Court 2012 (encl 22). For brevity, all rules hereinafter stated refer to the Rules of Court 2012 unless otherwise stated.

[2] On 15 April 2024, I allowed the application to make the orders in the following terms:

(1) that the respondent, the Malaysian Communications and Multimedia Commission ('MCMC') is required within 14 days from the date of this order:

(a) serve on the applicant, Wee Choo Keong, a list of documents ('the list') which are or have been in their possession, custody, power, or control and to file an affidavit verifying such list and to serve a copy of the affidavit verifying such list on the applicant; and

(b) serve on the applicant a notice of inspection stating the date, time, and place at which the documents stated in the list are to be inspected or such manner of inspection as may be mutually agreed between the parties and copies to be made and taken by the applicant within 14 days after the service of the list.

(2) that the MCMC is required within 14 days from the date of this order:

(a) serve on the applicant an affidavit stating whether any documents as described in Appendix A annexed in this application ('the documents sought') is or has at any time been, in their possession, custody, power, or control, and if not in their possession, custody, power or control; then when did they part parted with the documents and what has become of the documents ('discovery affidavit'); and

(b) permit inspection of and copies to be made and taken by the applicant of the documents sought within 14 days of the service of the discovery affidavit.

BACKGROUND FACTS

[3] The facts that led to the filing of the notice of application for discovery are as follows. The applicant is the owner of a blog website having his web address at weechookeong.com ('the blog'). The applicant has been operating the said blog for the past 18 years. On 24 July 2023, the applicant discovered that access to the blog was restricted. On 25 July 2023, the company hosting

the blog confirmed that the blog was blocked on the instructions of the MCMC. On 27 July 2023, the applicant's solicitors issued a letter demanding the MCMC to immediately restore access to the blog.

[4] On 30 July 2023, the MCMC's solicitors responded to the letter of demand stating that the MCMC acted on the request/instructions of the Royal Malaysian Police ('RMP') to provide technical assistance against the applicant in an investigation under s 500 of the Penal Code and s 233 of the Communications and Multimedia Act 1998 ('the CMA'). On the stalemate, the applicant immediately, on 3 August 2023, filed an application for leave to commence judicial review proceedings for the following principal reliefs:

(a) an order of certiorari to quash the decision and/or act of the MCMC to restrict/block access to the blog known as weechookeong.com which is owned by the applicant;

(b) an order of mandamus to compel the MCMC to immediately restore access to all Internet users to the blog known as weechookeong.com owned by the applicant; and

(c) a declaration that the decision and/or action of the MCMC to restrict/block access and/or to instruct/order the restriction/blocking of access to the blog is null and void for illegality and/or ultra vires the laws of Malaysia and the Federal Constitution.

[5] The grounds in support of the application were stated in the O 53 statement as follows:

(a) the action and/or decision by the MCMC was illegal being in violation of s 3(3) of the CMA, which states that the MCMC does not have the right to conduct Internet censorship;

(b) the action and/or decision by the MCMC was illegal being in violation of s 70 of the CMA which provides the applicant with the right to be heard;

(c) the MCMC acted illegally and *ultra vires* to the applicant's fundamental liberties, namely, 'equality before the law' and 'freedom of speech' guaranteed under arts 8 and 10(1) of the Federal Constitution;

(d) the MCMC had acted under the dictation of the RMP without exercising its own discretion as there was nothing in the blog that amounted to any violation of Malaysian laws;

(e) the MCMC does not have the right under s 233 of the CMA to block access to the blog and the said section only relates to punishment after an offence has been committed;

(f) the MCMC does not have any right under s 500 of the Penal Code to block access to the said blog; and

(g) the MCMC has blocked access to the blog and/or given instructions to block access to the said without according to the applicant the basic right to be heard and/or to show cause why access to the blog should not be blocked.

[6] Leave to commence judicial review proceedings for the abovementioned reliefs was granted on 30 August 2023. Thereafter, in the affidavit in reply in response to the instant judicial review application (encl 21), the MCMC averred that they had received a request and/or instruction from the RMP to block/restrict access to the applicant's blog.

[7] On 19 September 2023, the applicant's solicitors issued a letter to the MCMC's solicitors requesting certain documents. On 22 September 2023, MCMC's solicitors informed the applicant's solicitors that the said documents sought were part of PDRM's ongoing investigation and the MCMC was not at liberty to disclose the same.

[8] As a result, the applicant filed this notice of application for discovery (encl 22).

LAW ON DISCOVERY IN JUDICIAL REVIEW PROCEEDINGS

[9] The High Court is empowered by O 53 r 6 to grant discovery in judicial review applications. The relevant part of the rule states as follows:

> After leave has been granted, any party to an application for judicial review may apply to the Judge for discovery and inspection of documents pursuant to Order 24, …

[10] Thus, the discovery and inspection of documents are to be made according to the provisions of O 24. According to O 24 r 3(4) the documents that may be ordered discovered are: documents which the party relies upon or will rely upon: (a) documents which could adversely affect the party's own case; (b) documents that could adversely affect another party's case; or (c) documents that could support another party's case.

[11] However, under O 24 r 8 an order for discovery can only be granted if the court is of the opinion that discovery is necessary for disposing fairly of the cause or matter or for saving costs.

[12] It is trite that in order to succeed in an application for discovery the following three essential elements set out in *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581 must be satisfied: (a) there must be a 'document'; (b) the document must be 'relevant'; and (iii) the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

[13] However, discovery in judicial review proceedings is governed by its own principles different from that of the ordinary civil jurisdiction of the High Court. The governing principles upon which discovery can be ordered in judicial review proceedings were propounded in *Rekapacific Bhd v Securities Commission & Anor and other appeals* [2005] 2 MLJ 269 and approved and followed in *Tan Sri Dato' Sri Khalid bin Abu Bakar (DIG) Pengerusi Lembaga Tatatertib Polis Diraja Malaysia & Ors v Muhammad Farid bin Muntalib* [2015] 2 MLJ 783 and *Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor and another appeal* [2018] 2 MLJ 322; [2018] 1 CLJ 258 (all decisions of the Court of Appeal).

[14] The principles stated therein are taken from the summation of the applicable principle from Richard Gordon's work *Judicial Review and Crown Office Practice*. The principles (omitting cited case law) are stated in the following passages in the following words:

> In general, the following principles appear to govern the grant or refusal of discovery under O 53:
>
> (a) Discovery will not be ordered so as to make good defects in the applicant's evidence.
>
> (b) One will seldom obtain full private law-type discovery in a *Wednesbury* challenge.
>
> (c) By contrast, discovery will be ordered under O 53 where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter, (within the meaning of O 24 r 8).
>
> (d) Discovery will also be ordered to go behind the contents of affidavits if there was some matter before the Court that suggested that the contents of the affidavits were not accurate. By contrast, discovery will not be ordered where there is no reason to doubt the *bona fides* or accuracy of the reasons given in the affidavit.
>
> The most authoritative pronouncement remains that of Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 654. In relation to discovery under O 53 he indicated that:
>
> > ... Upon general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty; and it should be limited strictly to documents relevant to the issue which emerges from the affidavits.

A The second limb of this statement is unexceptionable. It is a rule that discovery and inspection must be restricted to matters relevant to an existing dispute.

[15] In *Rekapacific Bhd* the Court of Appeal concluded by saying that the
B restraint suggested by Lord Scarman in the *National Federation of Self-Employed and Small Businesses Ltd* case should be adopted by our courts when dealing with an application for judicial review. In *Kerajaan Negeri Selangor* was held that there is nothing to be resolved by discovery where the matter at the substantive hearing is purely a question of law, ie, whether the application for
C judicial review ought to be allowed on the ground that the authority acted contrary to law, unconstitutionally, unreasonably and irrationally.

[16] In *Tan Sri Dato' Sri Khalid,* the appeal was allowed thereby reversing the order of discovery made on the ground that the respondent has not met, apart
D from the principles stated in *Yekambaran Marimuthu* and *Rekapacific Bhd* but also the principles stated in *Carlow Kilkenny Radio Ltd, Kildare Radio Ltd and Carlow Kildare Radio Ltd v Broadcasting Commission of Ireland* [2003] 3 IR 528 which are stated as follows:

E ... discovery will not normally be regarded as necessary if the judicial review application is based on *procedural impropriety* as ordinarily that can be established without the benefit of discovery. Likewise, if the application for judicial review is on the basis that the decision being impugned was a wholly unreasonable one in the *Wednesbury* sense, discovery will again not normally be necessary because if the decision is clearly wrong it is not necessary to ascertain how it is arrived at. *Where*
F *discovery will be necessary is where there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate on the application or where there is prima facie evidence to the effect, either that a document which ought to have been before the deciding body was not before it or that a document which ought not to have been before the deciding body was before it.*

G **[17]** Thus, the cases show that discovery is granted on a more limited basis than in an ordinary action because the function of judicial review is to question the decision-making process and not whether the decision is in itself correct. For this reason, discovery will not be allowed where:

H (a) the allegation to resolve is on the basis of *procedural impropriety* which would include *legitimate expectation;*

(b) the allegation to resolve is on the basis of *illegality* which are pure questions of law; and

I (c) the allegation concerns the issue of *unreasonableness* in respect of the manner in which the decision is reached (except where there exists a dispute of facts in the affidavits).

[18] Conversely, discovery may be necessary where:

(a) the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty (*Inland Revenue Commissioners* case);

(b) there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate on the application;

(c) where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter (within the meaning of O 24 r 8); and

(d) there is prima facie evidence to the effect, either that a document which ought to have been before the deciding body was not before it or that a document which ought not to have been before the deciding body was before it.

[19] The above instances are not exhaustive in judicial review as there are allegations to resolve on issue of mala fides and bias which are stand-alone grounds for review and may in appropriate circumstances be necessary for discovery.

DECISION OF THE COURT

[20] The documents sought by the applicant in the instant application for discovery are as follows:

(a) letters and/or emails from RMP to the MCMC from August 2022 to date requesting the MCMC to block and/or restrict access to the blog known as weechookeong.com; and

(b) letters and/or emails from the MCMC to its licensees ie telecommunication companies instructing the said telecommunication companies to block and/or restrict access to the blog known as weechookeong.com.

[21] I am required to first determine that the basic elements for discovery are satisfied for discovery in judicial review proceedings as set out above and if so satisfied to determine whether the ultimate test ie whether the discovery is necessary for disposing fairly of the proceedings.

The existence and possession of the documents sought

[22] The MCMC has admitted in its affidavit in reply to discovery (encl 26)

the existence of the documents sought. The MCMC said that it has in its possession the document that contains the request/instruction by the RMP to block the applicant's blog and the document wherein instructions are given by the MCMC to the licensees to block the applicant's blog. These documents necessarily imply the existence of documents as to the fulfillment of the request/instruction by the RMP. The elements of existence and possession of the documents by the MCMC are satisfied. The applicant is not on a fishing expedition and neither would the discovery be unduly oppressive on the MCMC.

Whether the documents sought are relevant and necessary

[23] The MCMC's defence for their action and/or decision was premised on the fact that they were acting under the request /instructions of the RMP. What does request/instruction even mean? Was the MCMC compelled to act on the request or was it an instruction to act as directed? Did the MCMC act mechanically or exercise its discretion under the CMA? The MCMC did not make any averment in its affidavit in reply to state that the documents sought by the applicant were not relevant and/or necessary for the fair disposal of this application for judicial review.

[24] Nevertheless, it is very compelling from the affidavit evidence that the MCMC acted on the instructions of the RMP and not in the exercise of their discretion. In the circumstances the contents of the said request/instructions of the RMP are relevant for this Court to decide if the MCMC has acted in accordance with the requirements of the CMA.

[25] Thus, the documents sought are relevant as they relate directly to matters in question in the judicial review proceedings. The documents contain information which would enable the applicant to advance his own case or to damage the case of the MCMC.

Documents are necessary for disposing fairly of the matter

[26] I am satisfied that the applicant has brought himself within the limited area where discovery can be allowed in judicial review proceedings. The situation before me is one where the justice of the case may be advanced and where it is necessary to dispose fairly of the instant judicial review application.

[27] While the crux of the applicant's application was that the MCMC had acted illegally and/or irrationally to block and/or restrict access to the applicant's blog merely because the RMP had requested/instructed the MCMC to do so. It appears that the MCMC acted on the dictation of the RMP without exercising its own discretion. Thus, there is prima facie evidence

before me that documents which ought to have been before me were not produced to dispose of the matter fairly. A

[28] The MCMC had taken the position that they had acted based on the RMP's request and/or instructions to justify the blocking and/or restriction of access to the applicant's blog and yet refused to produce the said documents sought by the applicant. I am satisfied that the ultimate test to dispose of the matter fairly has been satisfied. Valid questions arise to ascertain whether as a matter of fact as to the nature of the request and/or instructions by the RMP and whether the MCMC had acted in accordance with the law when giving instructions to block and/or restrict access to the applicant's blog. Questions also arise as to the RMP's as to the propriety and/or validity of the grounds for so requesting and/or instructing the MCMC. The documents sought would enable the applicant to respond accordingly as to whether the request and/or instructions of the RMP were lawful and in accordance with the law. B C D

[29] Further, under s 3(3) of the CMA, the MCMC is prohibited from conducting any form of censorship of the internet which would include the applicant's blog. The question validly arises as to whether the MCMC has breached its statutory and public duty that there was no censorship. E

[30] In the upshot, the documents sought are relevant and necessary so that the justice of the case may be advanced and for disposing fairly of the substantive judicial review proceedings. Suffice it to say that in light of my findings in the preceding paragraphs, I was persuaded by the grounds raised by MCMC in opposition to the discovery application. F

WHETHER DOCUMENTS SOUGHT ARE PRIVILEGED

[31] The MCMC, however, raised an important question. It is this: whether the documents sought to be discovered are privileged and therefore cannot be made subject to an order of discovery. Order 24 r 15 provides as follows: G

> The foregoing provisions of this Order are subject to any written law or any rule of law which authorizes or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest. H

[32] The documents are privileged because they form part of ongoing criminal investigations against the applicant. It was submitted that such documents are confidential and there are restrictions on their disclosure. It was contended by the MCMC that the applicant is seeking documents that would disclose instructions by the RMP to the MCMC and communications between the RMP and the MCMC. I

[33] In this regard the MCMC relied on the following passage in *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2018] 6 MLJ 670, a decision of the Court of Appeal, which is reproduced below to appreciate the context in which the statement regarding disclosure of confidential information was made and for its full effect and purport. The passage read as follows:

> [41] The decisions in the above judicial authorities show that it is *not in all cases that reasons must be given for a decision by the public authority for* the established law is that there is no general duty universally imposed on all decision-makers to do so. In the present case, so far as the evidence shows, it is the respondents' case that the appellant was at the material time one of the persons under investigation by the Malaysian police for an offence allegedly committed under s 124B of the Penal Code which is his alleged involvement in an activity detrimental to parliamentary democracy. The first respondent, we would say, is not obliged or under a duty to inform the appellant that he is being investigated by the police and therefore is restricted from leaving the country. *Needless to say, police investigation is confidential and has restriction on its disclosure. It is implicit in the nature of such investigation that it should remain confidential and any disclosure to a suspect or any other persons may jeopardise investigation.* Thus, proceeding on a case by case basis, it is our judgment that based on the facts of the present case, the first respondent is not duty-bound and cannot be expected to provide reasons for his decision where the facts and the law are very clear, it cannot be any breach of duty where none exists in law. The respondents cannot be said to have deprived the appellant of any procedural fairness (*Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] MLJU 760; [2004] 2 CLJ 777).

[34] The MCMC relies on the following words in the above passage: *Needless to say, the police investigation is confidential and has restrictions on its disclosure. It is implicit in the nature of such investigation that it should remain confidential and any disclosure to a suspect or any other persons may jeopardise the investigation.*

[35] The MCMC averred that the RMP sought technical assistance against the applicant pursuant to an investigation the police were carrying out against the applicant under s 500 of the Penal Code and s 233 of the CMA. Section 500 of the Penal Code concerns the offence of defamation which under s 499 is defined as follows:

> Whoever, by words either spoken or, intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person; intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.
>
> While section 233 of the CMA provides as follows:
>
> (1) A person who —

(a) by means of any network facilities or network service or applications service knowingly — A

(i) makes, creates, or solicits; and

(ii) initiates the transmission of,

any comment, request, suggestion, or other communication which is obscene, indecent, false, menacing, or offensive in character with intent to annoy, abuse, threaten, or harass another person; or B

(b) initiates a communication using any applications service, whether continuously, repeatedly, or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at any number or electronic address, commits an offence C

(2) A person who knowingly —

(a) by means of a network service or applications service provides any obscene communication for commercial purposes to any person; or D

(b) permits a network service or applications service under the person's control to be used for an activity described in paragraph (a), to commit an offence.

(3) A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction. E

[36] Both the offences for which the MCMC averred the applicant was being investigated by the RMP concerned the offence of defamation and/or communication which is either obscene, indecent, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass another person through his blog. F

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[37] What transpired in the instant case according to the MCMC was that the RMP 'requested/instructed' them to block and/or restrict access to the blog which they did. This is not a situation of a request, for example, for police statements taken from persons assisting in investigations into a criminal offence or requesting for the investigation papers or communication between the office of Public Prosecutor and the RMP which are all privileged from disclosure (see *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 282; *Husdi v Public Prosecutor* [1979] 2 MLJ 304; and *Martin Rhienus v Sher Singh* [1949] 1 MLJ 201). H

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[38] Here, the applicant has been informed that he is being investigated for offences under section 500 of the Penal Code and section 233 of the CMA. As a result, the MCMC has blocked/restricted access to his blog. The applicant is challenging this act of blocking/restricting access to the blog. What is being

sought are the documents that are connected thereof and not documents concerning the investigation proper into the offences. In my view, the documents are not envisaged by the principle stated in *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2018] 6 MLJ 670. The production of these documents is not contrary to the public interest.

[39] The documents sought are not even investigation papers, investigation reports, information from police informants, or any form of class of documents which may pertain to the RMP's ongoing investigation against the applicant. The disclosure of the abovementioned classes of documents would be injurious to the public interest. The reasons could be tampering with witnesses or tampering with evidence ie documentaries or things or objects or destroying evidence and thereby jeopardising police investigations. There is no reason that the documents sought by the applicant would be injurious to the public interest.

[40] In this regard, I found instructive the following passage in the Indian Supreme Court case of *State of Uttar Pradesh v Raj Narain* AIR 1975 SC 865 approved by our Federal Court in *BA Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 14:

> *It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest.* Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will *proprio motu* exclude evidence the production of which is contrary to public interest. *It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demands protection.* (Emphasis added.)

[41] As shown above, the documents sought are not of a class that demands protection. The principle is that public interest demands that evidence being withheld is to be weighed against the public interest in the administration of justice and that courts should have the fullest possible access to all relevant materials. The documents sought are not in relation to police investigations but blocking or restricting access to the blog where one of the objects of the CMA is not to permit censorship of the internet. I am, therefore, satisfied that the discovery of the documents sought is permitted and not injurious to the public interest.

CONCLUSION

[42] For the above reasons, the application for discovery was allowed.

Application for discovery allowed.

Reported by Dzulqarnain Ab Fatar